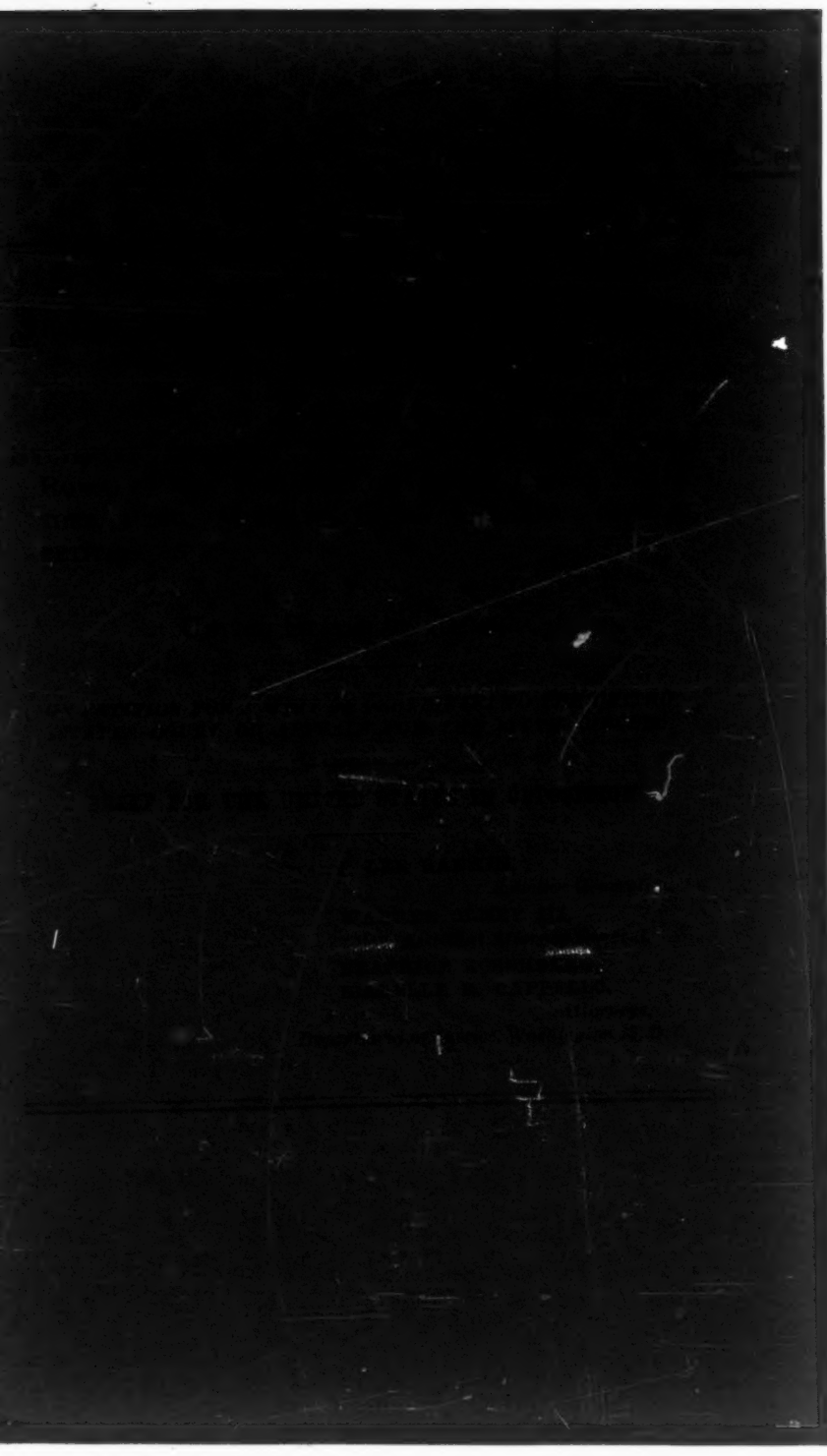

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 701

SYLVESTER POLIAFICO, SALVATORE LAZZARO, NUNZIO ROMANO, BEN YOSLOVITZ, ANTHONY CRISCI, SALVATORE PIERI, MICHAEL ERRA, ANTHONY NASELLI, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 1a–32a) is reported at 237 F. 2d 97.

JURISDICTION

The judgment of the Court of Appeals (Pet. 32a) was entered on August 31, 1956. A petition for rehearing was denied on November 26, 1956 (Pet. 32a). On December 21, 1956, Mr. Justice Reed extended the time for filing this petition to and including January 25, 1957. The petition was filed on January 22, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether there was a prejudicial variance between the indictment and the proof, in that one conspiracy was charged and several were proved.

2. Whether venue of substantive counts charging sale and facilitation of the transportation of narcotics was properly laid in the district to which the narcotics were transported.

3. Whether conspiracy to violate the narcotics laws and the substantive violations charged constituted separate offenses.

4. Whether it was error to deny a challenge to a jury array, refusing to summon the jury commissioner to testify as to the manner of the selection, when the challenge was not supported by any evidence that the selection was not in accordance with law.

5. Whether, on a charge of conspiracy to violate the narcotics laws, it is necessary to prove that the substances handled as narcotics by the co-conspirators were actually narcotics.

6. Whether reversible error resulted from rulings on the admissibility of evidence.

7. Whether reversible error resulted from the court's charge to the jury.

STATUTES INVOLVED

18 U. S. C. 2 (a) provides:

> Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

Section 2 (c) of the Narcotic Drugs, Import and Export Act of 1909, 35 Stat. 614, as amended, 38 Stat.

275 (1914); 42 Stat. 596 (1922); 43 Stat. 657 (1924); 65 Stat. 767 (1951); 21 U. S. C. 174, provides:

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be fined not more than $2,000 and imprisoned not less than two or more than five years. * * *

Sections 2553 (a) and 2554 (a) of the Internal Revenue Code of 1939, 53 Stat. 271, 272, as amended, 67 Stat. 506 (1953); 26 U. S. C. (Supp. 1) 2553 (a) and 2554 (a), provided:[1]

> § 2553. Packages—(a) General requirement.
>
> It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; * * *.
>
> * * * * *
>
> § 2554. Order forms—(a) General requirement.
>
> It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered,

[1] Now found in Sections 4704 (a) and 4705 (a) of the Internal Revenue Code of 1954, 68A Stat. 550, 551; 26 U. S. C. (Supp. III) 4704 (a) and 4705 (a).

exchanged, or given, on a form to be issued in blank for that purpose by the Secretary.

* * * * *

STATEMENT

An indictment filed in the District Court for the Northern District of Ohio charged petitioners, along with twelve other defendants, with conspiring to violate the narcotic laws of the United States, namely, 21 U. S. C. 174, 26 U. S. C. 2553 (a) and 2554 (a), and 18 U. S. C. 2 (a) (*supra*, pp. 2–3). Certain petitioners, as well as other defendants, were also charged with various substantive violations of the narcotic laws (see Ric. 3–14).[2]

Eighteen of the twenty defendants went to trial, Mazzie having been severed from the case on the ground of illness, and Consolo having pleaded guilty prior to trial. Filicia and Desimone pleaded guilty during the course of the trial (Gov. 84, 85). The case was presented to the jury against thirteen defendants on four counts, count 1 charging conspiracy, and counts 2, 11, and 16 charging substantive offenses. The jury found one defendant not guilty, and the remaining defendants guilty of the conspiracy (Crisci, 15a–16a). In addition, petitioner Poliafico was found guilty of counts 2, 11, and 16; petitioners Romano and Yoslovitz on count 2; and petitioner Pieri on counts 11 and 16 (Crisci 15a–16a).

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[2] Citations are to the appendices of appellee and appellants in the Court of Appeals, which form a part of the record filed with this Court. They will be designated as follows: appellants Riccobene—"Ric.", Poliafico—"Polo.", Yoslovitz—"Yos.", Crisci—"Crisci", and Lazzaro—"Laz."; and appellee—"Gov."

Sentences imposed upon petitioners were as follows: Poliafico received a total of fifteen years—5 years on count 1 to run concurrently with five years on count 2, and 5 years each on counts 11 and 16 to run consecutively (Polo. 139–140); Lazzaro, 3½ years on count 1 (Laz. Br. 1); Romano, concurrent terms of 5 years each on counts 1 and 2 (Laz. Br. 1, 2); Yoslovitz, concurrent terms of 3½ years each on counts 1 and 2 (Yos. 17a); Crisci and Erra, 5 years on count 1 (Crisci 17a; Polo. 141–142); Pieri, a total of 10 years—5 years on count 1 to run concurrently with 5 years on count 11, and 5 years on count 16 to run consecutively (Polo. 140–141); Naselli, 4 years, effective upon release from the term he was then serving (Polo. 142–143). Fines of $25, or less, levied upon Poliafico, Romano, Yoslovitz, and Pieri, were suspended. On appeal, all convictions were affirmed (Pet. 32a).

The conspiracy which petitioners were alleged to have engaged in was a continuing scheme to buy heroin in large, unadulterated quantities, and then resell it in small adulterated portions at a profit.

James Mandanici, named as a co-conspirator, and Frank Consolo were two of the chief government witnesses. Their testimony may be summarized as follows:

The conspiracy commenced in Cleveland, Ohio, when petitioner Poliafico, alias Polo, solicited Mandanici and Consolo to deliver narcotics for $100 per week. Poliafico told them that some heroin was coming in from New York and as soon as it arrived they could start the narcotic traffic (Ric. 21–22, 81–83). A few

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days later, about January 10, 1952, Consolo, petitioner Crisci (alias Crish), Poliafico and Riccobene were all in Consolo's apartment to which Riccobene brought a half kilo of heroin. Riccobene showed the others how to adulterate the narcotics and they weighed up 37 ounce packages (Ric. 85–92). Mandanici, also present in Consolo's apartment on January 10, remained in another room while the heroin was being mixed, but Consolo told him a half kilo of pure heroin had come in from New York and that the others were mixing it (Ric. 23–24).

During this meeting and at other times, financial arrangements were discussed. Riccobene at first, and later Crisci, made it clear that the narcotics were on consignment and would have to be paid for as they were sold (Ric. 93, 108). Crisci said he was going to stay in Cleveland until he collected some money to take back to New York (Ric. 33). Mandanici was told that he was to receive $100 a week (Ric. 35, 95). He was also told that Poliafico, Crisci, Consolo and Riccobene were partners and that if Consolo went away (on a Dyer Act charge) he (Mandanici) would become a partner (Ric. 35).

The first half kilo of heroin cost $7,500 or $8,000. Poliafico and Crisci told Mandanici and Consolo how much to charge for ounce lots (Ric. 40–42, 93). Mandanici and Consolo sold this heroin to the defendants Simmons and Warren (Ric. 37–38, 100–103) and turned the money over to Poliafico who, turn, paid it to Crisci (Ric. 41, 108–109; Gov. 73–74). On one occasion, Mandanici and Consolo turned over $400 directly to Crisci (Ric. 104–105). The money collected over and

above the cost of the half kilo of heroin was to be split four ways between Crisci, Riccobene, Poliafico and Consolo (Ric. 42–43). Mandanici received $100 per week until Consolo went to jail in March of 1952 (Ric. 42). Thereafter Mandanici was taken in as a partner and the profits were then split between Poliafico, Crisci, Riccobene and Mandanici (Ric. 43).

The first half kilo of heroin lasted until the middle of March 1952. When the supply was getting low Mandanici told Poliafico, who made arrangements for Crisci and petitioner Naselli to bring some more in from New York (Ric. 49). Accordingly, in March of 1952, Poliafico and Mandanici met Crisci and Naselli outside of Cleveland on Route 422 and there received another half kilo of heroin (Ric. 50). This second half kilo of heroin cost $7,500 and was also on consignment (Gov. 78). Mandanici cut it to make 123 ounces out of it (Ric. 52). It lasted about two months (Ric. 53).

Several times Crisci came to Cleveland to collect money in payment for the heroin and other times he sent Naselli (Ric. 52–53). Sometimes the money was sent to Crisci via Western Union (Ric. 53–54).

Some time in April of 1952, Mandanici was introduced to petitioner Erra by Poliafico (Gov. 9–10). When Poliafico asked Erra if he could get some cocaine for them, Erra said he would call his partner, "Nunzie" (petitioner Nunzio Romano), in New York (Gov. 10, 12). After a second conversation in May, 1952 (Gov. 9, 14), Erra told them he had made arrangements for Poliafico to go to New York to see "Rogie" (Rocco Mazzie) (Gov. 14). Poliafico then

went to New York. When he returned, he told Mandanici that he saw Mazzie and gave him $2,500 as a downpayment on a half kilo of heroin which, in a day or two, would be brought to Cleveland via plane by a man named Sal (petitioner Sal Lazzaro) (Gov. 16). As planned, a day or two later, Lazzaro arrived at the Cleveland Airport, where Poliafico introduced Mandanici to him, and Lazzaro turned over to Mandanici a half kilo of heroin (Gov. 16–18).

During the latter part of April or early part of May 1952, Naselli also delivered a quarter kilo of heroin to Mandanici (Gov. 19–20). This heroin, together with the half kilo previously delivered by Lazzaro, was adulterated and sold to Simmons and Filicia (Gov. 21, 22–23).[3] The quarter kilo of heroin brought in by Naselli and the half kilo of heroin delivered by Lazzaro lasted two and one-half to three months (Gov. 24).

During the latter part of June 1952, Poliafico told Mandanici that the cocaine was ready in New York and it was necessary to send someone there to get it (Gov. 24). Mandanici sent his brother, Joe Menage (Gov. 24–26), who called a number which had been given him and obtained a package which he brought back to Mandanici (Gov. 25, 95). This package, containing ten ounces of cocaine, was delivered by Mandanici to Simmons (Gov. 25–26).

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[3] Mandanici sold narcotics to Filicia about three times a week from June or July of 1952 until the time of his, Mandanici's, arrest in October of 1953 (Gov. 21–22). This was testified to by Filicia as well as Mandanici (Polo. 52; Ric. 38). Simmons admitted to a narcotics agent that he bought narcotics from Mandanici from January, 1952 to October, 1953 (Gov. 142–144).

Early in August of 1952, Mandanici met Poliafico, Erra and petitioner Ben Yoslovitz, alias Farmer, in Cleveland. The four of them went to Yoslovitz's apartment from which Yoslovitz brought out a half kilo of heroin which he gave to Mandanici (Gov. 28). Mandanici made 123 ounces out of this half kilo of heroin and he sold it to Simmons and Filicia during the next two months (Gov. 29). This half kilo of heroin came from Nunzio Romano in New York (Gov. 31). Mandanici first met Romano in Cleveland during the latter part of August 1952 in company with DeSimone and Poliafico (Gov. 32), who were introduced as partners in New York who had come for the money for the half kilo of heroin (Gov. 33). Mandanici then gave Poliafico the money he had collected from Simmons and Filicia (Gov. 35).[4]

Early in October of 1952, Mandanici was told by Poliafico that Yoslovitz had been given $200 to go to New York to get heroin from Romano and Tony (De Simone) (Gov. 39). Three or four days later, Mandanici and Poliofico met Yoslovitz, who told them he had brought a kilo (35 ounces) of heroin back from New York (Yos. 10a). The next day, Yoslovitz turned over the kilo of heroin to Mandanici, who took it to Munici's house and there cut it with milk sugar and quinine (Gov.

[4] During the latter part of September of 1952, some secret narcotic indictments against one Alex Clarco were released in Cleveland, and because of them Poliafico and Mandanici decided to go to New York for a few days to see if any indictments came out against them (Gov. 36). While in New York, they met Erra and Romano and told them they were going to "lay dead" for awhile and not to expect money so fast because of the Cleveland indictments (Gov. 37–38).

39). This kilo of heroin came from Romano and DeSimone (Gov. 43–44).[5]

Poliafico and Mandanici first started using quinine to mix with heroin about January of 1953 (Gov. 40) after Mandanici and Filicia had been getting complaints that the heroin was sticking in the needles used by narcotics addicts (Gov. 76; Polo. 54–55). In June of 1952, when Rogie (Rocco Mazzie) was in Cleveland, Poliafico asked him to get some quinine (Gov. 30–31). About October or November of 1952, Poliafico told Mandanici that the quinine was being mailed by Nunzie (Romano) from New York (Gov. 40–41). In January of 1953, Lazzaro, while in Cleveland, showed Mandanici how to cut the heroin with quinine (Gov. 41–42).

About May of 1953, Poliafico told Mandanici that he was going to make arrangements with petitioner, Sam Pieri, to get heroin out of Buffalo (Gov. 45). Accordingly, Poliafico, Yoslovitz and Mandanici met Pieri and Rizzo by prearrangement on the outskirts of Erie, Pennsylvania. Poliafico asked Pieri if he could get some heroin for him and Pieri said he would let him know in a few days (Gov. 45–47). Later that same month, Poliafico and Mandanici met Pieri in Buffalo, New York, and received ten ounces of unadulterated heroin from him (Gov. 47–48). Poliafico and Mandanici then returned to Cleveland and dropped the heroin off at Munici's house. It was later adulterated and the 72 ounces made therefrom were sold to Filicia and Simmons (Gov. 49).

The ten ounces received from Pieri in Buffalo lasted about two months (Gov. 50). In the early part

[5] This is the transaction involved in count 2.

of July 1953, Mandanici and the defendant Bucci drove to Erie, Pennsylvania, where they met Poliafico and Pieri (Gov. 51–52). Pieri transferred ten more ounces of unadulterated heroin to Mandanici (Gov. 51–52). Mandanici and Bucci then brought the heroin back to Cleveland and cut it into 72 ounces of adulterated heroin (Gov. 52–53).[6] Bucci and Mandanici sold part of this heroin to Filicia (Gov. 52–53; Polo. 59–60).[7]

In October 1953, Mandanici, the defendant Filicia and a girl drove to Erie (Gov. 53–54; Polo. 63–65). There, Mandanici again met Pieri and Poliafico and the three of them went to Pieri's car where ten more ounces of heroin were turned over to Mandanici (Gov. 53–55). Mandanici put the package of heroin in Filicia's car and he brought it back to Cleveland. Mandanici returned to Cleveland later that evening with Poliafico. The following morning, Mandanici met Filicia and Filicia turned over the ten ounces of heroin to him (Gov. 54–55; Polo. 66–67). Mandanici took this ten ounces of heroin to Consolo's house where he made 80 ounces out of it by mixing it with quinine and milk sugar (Gov. 55).[8]

The testimony of Mandanici and Consolo, who had not seen or communicated with each other since March of 1952 (Gov. 73; Ric. 98), was corroborated

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[6] This transaction was the one involved in count 11.

[7] On two occasions, September 14, 1953, and September 24, 1953, Filicia, acting in conjunction with government agents, purchased an ounce of heroin from Mandanici and turned it over to narcotics agent Voll (Polo. 60–63; Gov. 146–150).

[8] This transaction was the one involved in count 16.

by 38 other government witnesses and by 41 government exhibits.

ARGUMENT

1. Petitioner Pieri contends (Pet. 35–37) that since he was only one of several suppliers he was improperly joined in a single conspiracy charge with the other defendants. The evidence, however, clearly establishes a single conspiracy, with Poliafico, Consolo, and Mandanici at its core, to engage in illegal narcotics traffic in Cleveland. All who dealt with them, whether as buyer or seller, knew that they were part of a larger enterprise by which the narcotics went from wholesaler to retailer.

The thread of the conspiracy was not broken by the fact that the suppliers, of whom Pieri was one, joined at different times, and were not shown to have known one another. Although the law of conspiracy requires that all the conspirators know and join in the common purpose and plan, they need not all know each other or all the details of the operation. *Blumenthal* v. *United States*, 332 U. S. 539, 557. The conspiracy in *Blumenthal* was between a supplier and various salesmen to sell liquor at a higher price than set by law. The salesmen were not shown to have known each other, or the exact limits of the plan, but nevertheless, as here, they were part of a single conspiracy joined in the attainment of a common goal. 332 U. S. at 557–559. See also *United States* v. *Witt*, 215 F. 2d 580, 583 (C. A. 2), certiorari denied, *sub nom.*, *Talanker* v. *United States*, 348 U. S. 887; *United States* v. *Tramaglino*, 197 F. 2d 928, 930–931 (C. A. 2), certiorari denied, 344 U. S. 864; *Chadwick* v. *United*

States, 117 F. 2d 902, 903–904 (C. A. 5), certiorari denied, 313 U. S. 585; *Short* v. *United States*, 91 F. 2d 614, 617–618 (C. A. 4); and *Rudner* v. *United States*, 281 Fed. 516, 519–520 (C. A. 6), certiorari denied, 260 U. S. 734.

Moreover, Pieri's sentence need not rest on the conspiracy count. It may be supported on the two substantive counts, each relating to a sale of narcotics for transportation to Cleveland, which he was clearly shown to have made. These two counts were separate from the conspiracy count and had to be considered separately by the jury.

2. Petitioners Pieri and Poliafico contend that venue of counts 11 and 16 was improperly laid in the Northern District of Ohio because the evidence showed that the activities alleged in those counts took place in Buffalo, New York, and Erie, Pennsylvania (Pet. 37–38).

Counts 11 and 16 charge that petitioners Pieri and Poliafico, *inter alia*, "did * * * facilitate the transportation" of narcotics (Ric. 14). The evidence showed that narcotics were turned over in New York and Pennsylvania with the knowledge that they would be transported into the Northern District of Ohio, and that they were so transported (Statement, *supra*, pp. 10–11).

Since the indictment charged, and the proof established, an offense involving transportation in interstate commerce, venue, under the provisions of 18 U. S. C. 3237,[9] would lie in any district in which such an offense was begun, continued, or completed.

[9] 18 U. S. C. 3237 provides in part:

"Any offense involving the use of the mails, or transportation

Moreover, as the court below held (Pet. 25a), the question of venue was waived by the petitioners by their failure to raise it until the conclusion of the government's case. See *Lii* v. *United States,* 198 F. 2d 109, 113 (C. A. 9); *United States* v. *Jones,* 162 F. 2d 72, 73 (C. A. 2); *Hagner* v. *United States,* 54 F. 2d 446, 447 (C. A. D. C.), affirmed, 285 U. S. 427.

3. Petitioner Poliafico refers the Court to his brief in the Court of Appeals in which he argued that the evidence to sustain the offenses of concealing and transporting narcotics, charged in counts 11 and 16, included every element of the offense charged in count 1, the conspiracy count, and that, therefore, double punishment results from his five-year sentence on the conspiracy count, which runs consecutively with his five-year sentences on counts 11 and 16 (Pet. 38). It is, however, well established that the agreement to do an unlawful act is distinct from the doing of the act. *Pereira* v. *United States,* 347 U. S. 1, 11–12; *Pinkerton* v. *United States,* 328 U. S. 640, 643–644.

4. Petitioners contend that they were erroneously denied a hearing on whether certain groups were excluded from the jury array (Pet. 31–34). The record, however, shows no factual foundation which would justify a hearing (Polo. 6–11; Gov. 4–8).

In the midst of selecting the jury, counsel for petitioner Pieri asked the court to summon the person or

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in interstate or foreign commerce, is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce or mail matter moves."

persons who had acted in the capacity of a jury commissioner for an inquiry into the method and manner of impaneling the grand and petit juries. When the court informed counsel that there was a jury commissioner and that she resided in the Western Division of the District, counsel stated that he had not known of the existence of such an official. Counsel said he was not in a position to state that the selection was not made in accordance with the statutes, but was attacking it on the basis of a review of the panel itself and an examination of the names, which suggested to him a probability of the exclusion of certain national and racial groups. He also referred to the fact that some jurors had had jury service within a few months. He said it was his understanding, from what co-counsel in the case had told him, that the clerk prepared the list from names submitted by the marshal. He also stated he had no factual evidence to present to the court, either by affidavit or testimony, although the jury list had been available for at least two weeks.

The court ruled that it could not act favorably on the motion of defendants without any evidence to show that the selection of the jury was not made in accordance with law, and declined to summon the jury commissioner who was 200 miles distant. The court noted that counsel (who had been on the case for 17 days and replaced his associate) had had ample time to secure all the information he needed from the clerk of the court about the manner of selecting jurors. The court then overruled the challenge.

As the court below held (Pet. 19a), a challenge to the array must be supported by evidence, not sus-

picions. *Frazier* v. *United States*, 335 U. S. 497, 503; *United States* v. *Dennis*, 183 F. 2d 201, 216 (C. A. 2), affirmed, 341 U. S. 494.

5. Petitioners argue that the evidence was insufficient in that there was no proof that the substances Riccobene carried to the apartment of Consolo, and the substances obtained by Poliafico and Mandanici from Naselli and Crisci, were actually heroin, although Consolo and Mandanici stated they were (Pet. 39–40).

Petitioners have confused the proof necessary to establish a conspiracy to violate the law with that required to show a substantive violation thereof. On a charge of committing a substantive violation of the narcotic laws, the government must, indeed, establish that the substance involved was actually a narcotic, as it constitutes the *corpus delicti*. On the substantive counts involved here, the government did establish the nature of the substances involved to be heroin (Gov. 129–134, 154, 155–157, 158–159, 160–161). The cases cited by petitioner (Pet. 40), in which the government proved the existence of narcotics, all involved substantive counts of violating the narcotics law.

However, the *corpus delicti* of a conspiracy is the illegal agreement, and proof of its formation and an overt act taken pursuant thereto establish the crime. The overt act itself need not even be a crime. *Braverman* v. *United States*, 317 U. S. 49, 53. Thus, when the government proved that the petitioners agreed to violate the narcotic laws and took a step to carry it out (actually, the government showed 49 overt acts in furtherance of the conspiracy), proof of the crime of conspiracy was complete, without further need to show

that the substance handled by petitioners as heroin was, in fact, heroin.

6. Petitioners contend that various errors were committed in the admission of evidence.

a. Petitioners allege (Pet. 19–22) that reversible error was committed when on cross-examination of the witness Mandanici, who had already stated he was being detained in jail, the trial judge excluded a question as to the location of the jail. Almost immediately after the evidence was excluded, the witness stated the location of the jail (Gov. 67). Since the evidence excluded was elicited on subsequent cross-examination, there could be no prejudice resulting from the court's prior ruling (Pet. 14a).

b. Petitioners allege (Pet. 14–15) that the trial judge erred in refusing to order the production of written statements made by Mandanici to narcotics agents prior to trial for use on cross-examination, and that the error was not cured by the voluntary furnishing of the statements, several days later, with an offer to recall Mandanici for cross-examination.

At the time defense counsel asked for the production of the written statements of Mandanici, there had been no proof that they were inconsistent with his trial testimony and they had not been used in any way. It is therefore doubtful that they were entitled to them. See *Gordon* v. *United States*, 344 U. S. 414, where this Court held that production of written statements should have been ordered *after* a proper foundation had been laid, by showing, *inter alia*, that they were contradictory of present testimony. See also *Goldman* v. *United States*, 316 U. S. 129, 132. That

question need not, however, be reached since petitioners did in fact receive the pre-trial statements (Gov. 114–115), and they used them in cross-examining other witnesses (Crisci 8a). They had the opportunity to recall Mandanici for cross-examination, but, instead, entered into a stipulation as to a discrepancy between a portion of his written statement and the testimony of Consolo as to who showed them how to adulterate the heroin (Ric. 199). This minor discrepancy presented no real grounds for impeachment. Since petitioners have not demonstrated any prejudice resulting from the court's order which initially denied them the written statements, no reversible error is shown. Cf. *United States* v. *Fontana,* 231 F. 2d 807, 809 (C. A. 3).

c. Petitioners allege (Pet. 41–43) that error was committed in curtailing cross-examination of the witness Mandanici on matters which had come to the examining attorney's attention when he previously represented Mandanici on a narcotics charge. They claim the matters sought to be elicited were not within the client's privilege, and that counsel was not allowed to ascertain if Mandanici was willing to change his mind about claiming the privilege.

The pertinent facts are as follows:

One of the defense counsel, Mr. Redmond, had previously represented Mandanici on a narcotics charge. When the court discovered that he was cross-examining Mandanici as to conversations between them during that period, the court informed Mandanici of the privileged nature of the conversations. Mandanici

then declined to answer the questions (See Pet. 19a–20a).

Redmond nevertheless continued to query Mandanici as to matters relating to the narcotics case in which he had represented him (Laz. 5a–6a):

> Q. Did you ever tell your friends that lived in your neighborhood that you were not the one that left two ounces of narcotics under a mail box?
>
> Mr. CANARY. Now, your Honor, I object.
>
> The COURT. Mr. Redmond——
>
> Mr. REDMOND. Yes, your Honor.
>
> The COURT. Does this relate to the charge against him at that time?
>
> Mr. REDMOND. Yes, it does, your Honor, but it is not——
>
> The COURT. Just a moment. Was that statement made in your presence?
>
> Mr. REDMOND. That statement was given to me by other people—not to me, I mean——
>
> The COURT. Was it made in your presence?
>
> Mr. REDMOND. No, it was not.
>
> The COURT. Did it come to you at the time you were representing him as a lawyer?
>
> Mr. REDMOND. Yes, your Honor, it did, but that——
>
> The COURT. Sustained. We are not concerned about that.

* * * * *

Later, during the cross-examination of Mandanici by another defense counsel, Mandanici was asked if he had been asked questions by Mr. Redmond which pertained to conversations they had while in the attorney-client relationship and which he had refused

to answer on the basis of a privilege the client has. The following colloquy then took place (Laz. 6a–7a):

> The COURT. What is the purpose of going into that?
>
> Mr. MELTZER. I want to ask him whether he at this time is willing to waive the privilege so that he can relate to us what the conversation was.
>
> The COURT. Is there an objection to the question?
>
> Mr. CANARY. Well, I don't know whether there is a question, your Honor. If it is a question I object to it, yes.
>
> The COURT. Well, I will certainly sustain it.
>
> Mr. MELTZER. Your Honor, may I not ask this witness whether he is willing to waive at this time his privilege of testifying as to those conversations relating to this affair here, in the interest of justice?
>
> Mr. CANARY. No, I object to that statement.

* * * * *

Petitioners admit that the questions which related to conversations between Redmond and Mandanici while in an attorney-client relationship were covered by the privilege, but argue that the information which came to Redmond from other sources during that time was not. The court below noted that it appeared that all the questions did, in fact, pertain to conversations between Mandanici and counsel Redmond, in which case they were clearly privileged. It also found that even if some of the questions related to matters counsel Redmond had heard from third parties while engaged in Mandanici's defense, they were properly excluded (Pet. 22a). This was so because Mandanici

had not testified to anything contrary to the matters asked in the excluded questions. The questions were therefore worthless as a test of Mandanici's credibility. His cross-examination (which covered 417 pages of the transcript) was properly limited in this minor and collateral respect. Certainly, the limitation was not beyond the discretion that reposes in a trial judge to control cross-examination. *Glasser* v. *United States,* 315 U. S. 60, 83; *Gariepy* v. *United States,* 220 F. 2d 252, 263 (C. A. 6), certiorari denied, 350 U. S. 825; *United States* v. *Wheeler,* 219 F. 2d 773, 776–777 (C. A. 7), certiorari denied, 349 U. S. 944.[10]

d. Petitioners allege (Pet. 16–17) that prejudicial error was committed in permitting the defendant Filicia, after he pleaded guilty in the midst of the trial, to become a government witness. In this connection, the petitioners point out that other witnesses were excluded from the courtroom until called.

While a separation of witnesses was ordered at the outset of the case, Filicia was not at that time a witness, but a defendant whose presence in the courtroom was required (Rule 43, Federal Rules of Criminal Procedure). Certainly, the mere fact of his presence in the courtroom as a defendant did not affect his right to testify subsequently as a witness for the government. In *Carrado* v. *United States,* 210 F. 2d 712, 718–719 (C. A. D. C.), certiorari

[10] Nor was there an abuse of discretion in refusing to allow a later question as to whether Mandanici was willing to waive the privilege. The witness had already declared he would not waive the privilege; and there was nothing to indicate that he had changed his mind.

denied, *sub nom. Atkins* v. *United States,* 347 U. S. 1018, an identical situation occurred and the testimony was similarly permitted. Cf. *United States* v. *Beck,* 118 F. 2d 178, 183 (C. A. 7), certiorari denied, 313 U. S. 587.

The *Carrado* case was decided by the Court of Appeals for the District of Columbia after its decision in *Caldwell* v. *United States,* 205 F. 2d 879, upon which petitioners rely. The facts in *Caldwell* immediately explain the difference in result. In *Caldwell,* the testimony in question came from a man who had acted in a dual capacity as defense assistant and government agent; he had gained free access to the planning of the defense and had then reported in full to the government.

In the instant case, the government represented to the court that it had not received any information from Filicia with respect to any conferences or in relation to any matter which he learned in conference with defendants or their counsel (Gov. 169). No contrary evidence was submitted, although the court offered defense counsel an opportunity to do so (Gov. 168).

e. Petitioners allege (Pet. 17–19) that the exclusion of the proffered testimony of Mrs. Giaimo was erroneous.

Petitioners offered to prove by Mrs. Giaimo that she was Mandanici's landlady in 1953; that he told her of various trips he had made, but did not tell her where; that at one time he offered her $500 to pick up a package for him in Chicago, which she believed contained counterfeit money; that he made long dis-

tance telephone calls to Boston and California; and that the day after he was arrested on a narcotics charge he told her the police had beaten him up (Ric. 204–205; R. 2097–2100).

The court ruled that the witness could testify only as to the conversation she had with Mandanici the day after he was arrested, since the rest was not even remotely relevant and did not tend to disprove anything to which Mandanici had testified (Ric. 207).

Petitioners claim that the testimony of Mrs. Giaimo would have contradicted the testimony of Mandanici. It is well established, however, that before evidence is admissible to impeach the credibility of a witness, a proper foundation must first be laid by directing the witness's attention to the conversation with the particular person, to the time and place it was alleged to have occurred, and to the substance. *Robinson* v. *United States,* 144 F. 2d 392, 405 (C. A. 6), affirmed, 324 U. S. 282. See also, *Burton* v. *United States,* 175 F. 2d 960, 965 (C. A. 5), certiorari denied, 338 U. S. 909; *United States* v. *Angelo,* 153 F. 2d 247, 251 (C. A. 3); *Stinson* v. *Aluminum Company of America,* 141 F. 2d 682, 686 (C. A. 6). Since petitioners had established no foundation for Mrs. Giaimo's testimony, it was properly excluded.

f. Petitioners allege (Pet. 9–14) that it was error to permit the government to read to government witnesses Brunello and Artino portions of their contradictory grand jury testimony and prior written statements to narcotics agents, after they had unexpectedly turned hostile on the stand.

The prior contradictory matter was read under the following circumstances (Ric. 169–197; Polo. 22–50):

Sam Brunello, named as a co-conspirator but not indicted in this case, was called as a government witness. After testifying to certain preliminary matters, Bruno interrupted in the middle of question and volunteered, "Well, sir, everything in my testimony that I said were lies. I am here to tell the truth." He was then asked if he had made a trip to the Cleveland airport in the spring of 1952. (Mandanici had previously testified that Brunello had accompanied him to the airport in the spring of 1952 when Naselli delivered ten ounces of heroin to him there.) Brunello denied making any such trip to the airport, but volunteered that this was in his prior testimony. He also volunteered that he had been threatened with a $25,000 bond if he did not cooperate. In both his grand jury testimony and prior written statement, Brunello had stated he accompanied Mandanici to the Cleveland airport in May of 1952 when a package was delivered to Mandanici.

After Brunello indicated his hostility, he testified as to the time and place of the taking of his written statement and the persons present. He also identified the statement he had made. Then, for the purpose of refreshing his recollection, he was questioned as to whether he remembered being asked a particular question appearing in the statement (respecting his narcotic activities). He stated that he recalled it. He was then asked if he recalled his answer, and it was read to him. He stated he did not remember giving

that answer; that he remembered it being said, but that it was said by Mandanici and not by him. Another question and answer were then read to him in the same manner, and he denied making the answer. Then, as the government counsel was in the midst of reading another question from the witness' prior statement, counsel for the defendants objected for the first time.

After counsel entered an objection, the witness was asked if he remembered one more question that was asked him in his statement. He said he recalled being asked the question. He was then asked if he recalled the answer he gave. He stated he did not give the answer; that Mandanici gave it. The answer was then read to him and he was asked if he recalled making it. He said, "No." Brunello then stated, in response to a series of questions, that he had testified under oath before the grand jury in May of 1954. The witness was then interrogated as upon direct examination as to his narcotic activities, which were material to the case. In some instances he gave answers consistent with his grand jury testimony and in many instances he gave contrary answers. Where contrary answers were given, the witness was questioned as to whether he recalled being asked a particular question before the grand jury. He nearly always said he remembered the question being asked. He was then asked if he recalled his answer. In a number of instances, he said he did and then stated what his answer had been. It was only in those instances where he said he did not recall his answer or where he recalled it incorrectly that his answer

before the grand jury was read to him to refresh his recollection. Several times Brunello said his recollection was refreshed by this procedure.

Like Brunello, Artino also repudiated his prior grand jury testimony and written statements, which he claimed were obtained by duress on the part of narcotics agents. The government, surprised at his repudiation, followed the same procedure of reading to him portions of his contradictory grand jury testimony and written statements (Gov. 104–107).

Petitioners argue that since the witnesses repudiated their prior statements before they gave material testimony, the government should not have continued to question them. But even though they had lied in their previous statements, the government had a right to seek their testimony on the stand. As a result of this direct examination Brunello admitted, in corroboration of Mandanici's testimony, and without being refreshed by a reading of his prior statements, that he had driven to New York with Menage in June of 1952 and had sent a money order to DeSimone and Poliafico (Ric. 188–189, 191–192). And since the government properly continued the examination, it was proper for the government to read what the witnesses had previously said when their answers proved contradictory.

In *Hickory* v. *United States*, 151 U. S. 303, 309, the Court stated:

> When a party is taken by surprise by the evidence of his witness, the latter may be interrogated as to inconsistent statements previously made by him *for the purpose of refreshing his*

> ***recollection and inducing him to correct his testimony; and the party so surprised may also show the facts to be otherwise then as stated, although this incidentally tends to discredit the witness.*** [Emphasis added.]

In *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 231–235, there were 90 instances where grand jury testimony was read to hostile witnesses, over objection of counsel, for the purpose of refreshing the witnesses' recollections, and at least one of them testified that his grand jury testimony was not true. In holding that this procedure did not constitute error, the Court stated (310 U. S. at 233):

> As in case of leading questions, *St. Clair* v. *United States*, 154 U. S. 134, 150, such use of grand jury testimony for the purpose of refreshing the recollection of a witness rests in the sound discretion of the trial judge. See *DiCarlo* v. *United States*, 6 F. 2d 364, 367–368; *Bosselman* v. *United States*, 239 F. 82, 85; *Felder* v. *United States*, 9 F. 2d 872. He sees the witness, can appraise his hostility, recalcitrance, and evasiveness or his need for some refreshing material, and can determine whether or not under all the circumstances the use of grand jury minutes is necessary or appropriate for refreshing his recollection. * * *

See also *Wheeler* v. *United States*, 211 F. 2d 19, 24–26, certiorari denied, 347 U. S. 1019; *Carrado* v. *United States*, 210 F. 2d 712, 721 (C. A. D. C.); *Pastrano* v. *United States*, 127 F. 2d 43, 45–46 (C. A. 4); *United States* v. *Graham*, 102 F. 2d 436 (C. A. 2), certiorari denied, 307 U. S. 643.

The trial judge clearly and thoroughly explained to the jury, when this prior contradictory matter was read, that the cross-examination was permitted only to refresh the witnesses' recollections and the questions and answers read from the grand jury transcript and the witnesses' prior statement were not evidence to be considered by them in this case (Ric. 194–195, 196–197; Polo. 39, 40–41, 90–91, 129–130; Gov. 79, 92).[11]

Petitioners also contend (Pet. 12–13) that allowing the narcotics agents to testify to the manner in which they obtained the statements from Brunello and Artino served improperly to bolster the prior inconsistent statements of the witnesses and give them weight beyond the limited purpose of refreshing the witnesses' recollections. This testimony by the narcotics agents was made necessary, however, by the declarations of the witnesses that their prior statements were obtained by the duress and threats of the narcotics agents. Cross-examination of Brunello and Artino on this damaging testimony was extensive. Therefore, to establish the credibility of the narcotics agents when they testified for the government, it was proper that the government have the narcotics agents deny the use of duress in obtaining the statements.

Finally, petitioners suggest that mere instructions

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[11] Petitioners cite as obscure the instruction given when Artino's prior inconsistent statement was read to him (Pet. 13). They base their complaint on the ground that, while the instruction told the jury not to consider the statements as evidence, it did not tell them for what purpose it was to be considered. However, the first part of that instruction, which petitioners do not cite, clearly tells the jury the only purpose to be served by the statements was the refreshing of Artino's recollection (Polo. 90–91).

cannot erase from the jury's mind what they heard (Pet. 14). However, this Court has only recently reiterated its holding in *Opper* v. *United States,* 348 U. S. 84, 95, that our whole theory of trial depends upon the ability of a jury to follow instructions. *Dell Paoli* v. *United States,* No. 33, O. T. 1956, slip opinion, pp. 10–11. When instructions are as clear as those in this case, we must assume that the jury did follow them.

The evidence adduced through these two witnesses was cumulative and served only to corroborate some details given by the other government witnesses. Had they testified in line with their grand jury testimony and prior written statements, it would have added little additional weight to the government's case.

7. Petitioners cite several portions of the trial judge's charge to the jury as constituting reversible error.

a. In the portion of the charge dealing with the credibility of witnesses, the judge told the jury that, in weighing the credibility of Brunello's and Artino's testimony that the government agents used duress to obtain their statements against the agents' denial, they should consider that Brunello and Artino had repudiated sworn grand jury testimony (Ric. 259–260). Earlier, in line with instructions given at the time the testimony was admitted, the jury had been told to eradicate from their minds any impression left by the questions put and the answers given by Brunello and Artino in previous statements and grand jury testimony (Ric. 250–252). Petitioners contend

(Pet. 22–27) that the later instruction is inconsistent with the earlier and told the jury to remember what the first instruction told them to forget—the grand jury testimony.

We find no such conflict between these two instructions, each of which correctly states the law. The instruction on credibility did not tell the jury to remember the grand jury testimony itself; it told them to remember that Brunello and Artino had repudiated sworn testimony before a grand jury—a fact which both witnesses admitted on the stand, which was in no way based upon the grand jury testimony itself, and which was properly put before the jury as a factor bearing on credibility.

b. Petitioner Poliafico alleges as error (Pet. 27–31) the refusal of the trial judge to instruct the jury that evidence of his good character in itself might be sufficient to create a reasonable doubt as to his guilt.

The trial judge gave the following instruction (Ric. 260–261):

> The defendant Poliafico has offered evidence here of his good reputation. You will consider this evidence and determine its weight, together with all the other evidence in the case in arriving at your verdict as to the guilt or innocence of the defendant Poliafico.

The treatment to be accorded character evidence was set forth in the leading case of *Edgington* v. *United States,* 164 U. S. 361, which held that it is error for the trial court to tell the jury to consider character evidence only when the scales are already in balance. This Court stated (164 U. S. at 366) that:

> Whatever may have been said in some of the earlier cases, to the effect that evidence of the good character of the defendant is not to be considered unless the other evidence leaves the mind in doubt, the decided weight of authority now is that good character, when considered in connection with the other evidence in the case, may generate a reasonable doubt. The circumstances may be such that an established reputation for good character, if it is relevant to the issue, would alone create a reasonable doubt, although without it the other evidence would be convincing.

Some circuits, including the Seventh in *United States* v. *Donnelly*, 179 F. 2d 227, and the Tenth in *Hayes* v. *United States*, 227 F. 2d 540, upon which petitioners rely (Pet. 29–30), have read this language in *Edgington* to mean that an instruction on good character must charge that the character evidence be considered together with all the other evidence and, also, that it might in itself create a reasonable doubt. We do not believe that the statement in *Edgington* that character evidence may alone create a reasonable doubt was an announcement of a rule of law. It was merely a statement of what may result in some cases from the application of the correct rule *i. e.*, the rule that character evidence be considered together with all the other evidence. As the Second Circuit said in *United States*. v. *Antonelli Fireworks Co.*, 155 F. 2d 631, 639, certiorari denied, 329 U. S. 742:

> * * * all that the Edgington case holds is that the trial court must not tell the jury to consider the character evidence only when the scales are already in balance. "But if the judge avoids that pitfall, as here he did, he has as many vari-

> ants among which to choose as he has in general; evidence of good character is to be used like any other, once it gets before the jury, and the less they are told about the grounds for its admission, or what they shall do with it, the more likely they are to use it sensibly." *Nash* v. *United States, supra,* 2 Cir., 54 F. 2d 1006, 1007.

See also, *United States* v. *Lowenthal,* 224 F. 2d 248, 249 (C. A. 2); *Gariepy* v. *United States,* 220 F. 2d 252, 261 (C. A. 6), certiorari denied, 350 U. S. 825; *Mansfield* v. *United States,* 76 F. 2d 224, 230–231 (C. A. 8); *Baugh* v. *United States,* 27 F. 2d 257 (C. A. 9), certiorari denied, 278 U. S. 639.

In the circumstances of this case, there is no occasion to resolve the slight conflict among the circuits. Unlike the *Donnelly* case, the situation here is not whether the jury believed one witness, who was an accomplice, or the defendant. In this case, several government witnesses testified directly to the narcotic activities of Poliafico, and, though they were accomplices, their testimony was bolstered by that of numerous other government witnesses as well as by various exhibits. Poliafico was, under the government's testimony, a central figure in the ring, so that if the jury credited the government's testimony against any defendant, it had to credit that testimony against him.

c. Petitioner Crisci argues (Pet. 40–41) that the instruction to the jury that, under the law, it could not "draw any inference of guilt" from his failure to testify (Ric. 260) was erroneous because it was not in the exact words of 18 U. S. C. 3481 which provides

that failure to testify "shall not create any presumption against him."

As held by the court below (Pet. 29a), it is not necessary to charge the jury in the exact language of the statute. The instruction given, together with the previous instruction that the defendants were clothed with the presumption of innocence which remained with them throughout the case until such time, if at all, the jury became convinced of guilt of one, or some, or all, beyond a reasonable doubt, completely safeguarded petitioner's rights under the statute.[12]

CONCLUSION

For the foregoing reasons, its is respectfully submitted that the petition for a writ of certiorari be denied.

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FEBRUARY 1957.

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[12] The case of *Bruno* v. *United States*, 308 U. S. 287, upon which petitioner relies (Pet. 41), involved a situation where *no* charge was given respecting the defendant's failure to testify and holds that the charge should have been given, but does not require that it be in the exact words of the statute.

U. S. GOVERNMENT PRINTING OFFICE: 1957